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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

AREKNAZAN POGHOSYAN, Plaintiff and Appellant, v. CITY OF GLENDALE, Defendant and Respondent.	B287132 (Los Angeles County Super. Ct. No. BC602948)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert B. Broadbelt, Judge. Affirmed.

Law Offices of Haik Beloryan and Haik Beloryan for Plaintiff and Appellant.

Michael J. Garcia, City Attorney, Ann M. Maurer, Chief Assistant City Attorney, and David Ligtenberg, Deputy City Attorney, for Defendant and Respondent.

Areknazan Poghosyan filed suit against respondent City of Glendale (City) after she tripped and fell on a City sidewalk, alleging the sidewalk was in a dangerous condition within the meaning of Government Code sections 830, 835, and 835.2.[1] She appeals from the judgment entered after the trial court granted respondent's summary judgment motion. We affirm.

BACKGROUND

Factual Background

Around noon on January 19, 2015, appellant was walking on a sidewalk near 1248 South Glendale Avenue in the City. She was looking forward while she walked when her foot struck a raised portion of the sidewalk, and she fell. Appellant previously had noticed the sidewalks were "not always perfectly flat," but she had never fallen before. Appellant did not see the condition of the sidewalk before she fell, and she did not notice dirt, leaves, or other debris covering it.

Gary Edsall, a construction service manager in the City's public works department, stated in a declaration that he went to investigate the offset sidewalk in June 2015. He placed a ballpoint pen next to the offset "to show that the offset was approximately the height of the pen" and took photographs of the pen next to the offset. He then measured "a similar pen" to show that the pen was approximately one-half inch in height.

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[1] Unspecified statutory references will be to the Government Code.

Edsall further stated that in April 2014, the City started an improvement project called the Glendale Avenue Wastewater Capacity and Street Improvement Project. The purpose of the improvement project was "to upsize approximately 1,950 linear feet of sanitary sewer main; selectively remove and replace damaged concrete curbs, driveway aprons, sidewalks, and bus pads; and rejuvenate existing asphalt concrete based along Glendale Avenue from San Fernando Road to Broadway (an approximate 1.7-mile stretch)." The project area included the sidewalk where appellant fell. The improvement project was completed in August 2015.

Before the improvement project was begun, City inspectors conducted a walking inspection, documenting streets and sidewalks in need of repair or replacement. The inspectors marked for repair sidewalks that had offsets measuring more than half an inch. Photographs taken on August 15, 2014, and September 26, 2014, showed that portions of the sidewalk near 1248 South Glendale Avenue were slated for repair, but the offset where appellant tripped had not been marked as an area needing repair.

Ray Torres, the street superintendent for the City's public works maintenance services section, stated in a declaration that there were several ways the public could make reports of sidewalks needing repair: a phone call during business hours; email; a 24-hour City hotline; an online form on the City's website; or a report on "My Glendale," a free smartphone app "used to report any type of quality of life issues in the City." When the City receives a report of an issue with a sidewalk, such as an offset or broken concrete, a service request form is generated and

assigned to a street maintenance employee. There had not been any service requests, complaints, or accidents near 1248 South Glendale Avenue.

On June 22, 2015, Torres went to inspect the sidewalk where appellant fell in order to investigate her claim for damages. He noted that the improvement project was taking place near the area and referred the claim to Public Works Engineering for further investigation. On January 4, 2017, Torres measured the offset where appellant fell and took photographs. At its highest point, the offset measured slightly over one-half inch.

Procedural Background

On December 4, 2015, appellant filed a complaint asserting causes of action for general negligence and premises liability. The premises liability cause of action contained three counts: negligence, willful failure to warn, and dangerous condition of public property.

On December 8, 2016, the trial court sustained respondent's demurrer to appellant's first cause of action for general negligence on the ground that there is no statutory basis for such a cause of action against a public entity. (See § 815, subd. (a) ["Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."].)

On April 17, 2017, respondent moved for summary judgment or summary adjudication. The court granted summary adjudication as to appellant's counts for negligence and willful failure to warn. Appellant

does not challenge these rulings on appeal. However, the trial court denied the summary judgment motion as to the dangerous condition count, finding a triable issue of material fact as to respondent's constructive knowledge of the allegedly dangerous condition.

Respondent petitioned for writ of mandate, which we granted on September 20, 2017. On November 1, 2017, the trial court complied with the alternative writ by receiving supplemental briefing and then granting respondent's summary judgment motion. On November 20, 2017, the court entered judgment in favor of respondent. Appellant timely appealed.

DISCUSSION

I. *Standard of Review*

"'A court may grant a summary judgment only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. [Citation.] The defendant can satisfy its burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential element. [Citation.] If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. [Citation.] [¶] We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in

favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. [Citation.]' [Citation.]" (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 914.) "We independently consider the evidence offered by both sides in connection with the motion, except that to which objections were properly sustained, and uncontradicted inferences reasonably supported by that evidence, to determine whether facts not subject to triable dispute warrant judgment for the movant as a matter of law. [Citations.]" (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 565 (*Stathoulis*).)

II. *Applicable Law*

"Section 835, subdivision (b), states that a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes: (1) the property was in a dangerous condition at the time of the injury; (2) the plaintiff's injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury the plaintiff incurred; *and* (4) the public entity had actual or constructive notice of the dangerous condition for a sufficient time prior to the injury to have taken measures to protect against it." (*Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317 (*Heskel*).)

"A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its

dangerous character. [¶] (b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (§ 835.2, subds. (a) & (b).)

"Admissible evidence for establishing constructive notice is defined by statute as including whether a reasonably adequate inspection system would have informed the public entity, and whether it maintained and operated such an inspection system with due care. (§ 835.2, subd. (b)(1), (2).) [¶] Whether the dangerous condition was obvious and whether it existed for a sufficient period of time are threshold elements to establish a claim of constructive notice. [Citation.] Where the plaintiff fails to present direct or circumstantial evidence as to either element, his claim is deficient as a matter of law. [Citation.]" (*Heskel*, *supra*, 227 Cal.App.4th at p. 317.)

"A condition is 'dangerous' if it creates a 'substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used.' (§ 830, subd. (a).)" (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 565.) Conversely, under the trivial defect doctrine, codified in section 830.2, "a condition is 'not dangerous,' if 'the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable

person would conclude that the condition created a substantial risk of injury when such property . . . was used with due care . . .' in a reasonably foreseeable manner. (§ 830.2.)" (*Id.* at pp. 565-566.)

"The trivial defect doctrine is not an affirmative defense. It is an aspect of a landowner's duty which a plaintiff must plead and prove. [Citation.] The doctrine permits a court to determine whether a defect is trivial as a matter of law, rather than submitting the question to a jury. [Citation.] 'Where reasonable minds can reach only one conclusion—that there was no substantial risk of injury—the issue is a question of law, properly resolved by way of summary judgment.' [Citations.] 'The rule which permits a court to determine "triviality" as a matter of law rather than always submitting the issue to a jury provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property. . . . [A] landowner is not an insurer of the safety of its users.' [Citation.]" (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 567.)

Although the size of the defect "is a pivotal factor in the determination" of whether a condition of public property is trivial as a matter of law (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 567), other factors include "both the physical description of the condition, and 'whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract [description] would indicate.' [Citation.]" (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234 (*Sambrano*).)

"'Aside from the size of the defect, the court should consider whether the walkway had any broken pieces or jagged edges and other conditions of the walkway surrounding the defect, such as whether there was debris, grease or water concealing the defect, as well as whether the accident occurred at night in an unlighted area or some other condition obstructed a pedestrian's view of the defect.' [Citation.] The court should also consider the weather at the time of the accident, plaintiff's knowledge of the conditions in the area, whether the defect has caused other accidents, and whether circumstances might either have aggravated or mitigated the risk of injury. [Citations.]" (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 567.) "If the defect is of such trivial character that it presents no element of conspicuousness or notoriety, its continued existence does not impart constructive notice to the municipality. [Citations.]" (*Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 73.)

"'Whether property is in a dangerous condition often presents a question of fact, but summary judgment is appropriate if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines that no reasonable person would conclude the condition created a substantial risk of injury when such property is used with due care in a manner which is reasonably foreseeable that it would be used. [Citations.]' [Citation.]" (*Sambrano*, *supra*, 94 Cal.App.4th at p. 234.)

III. *Analysis*

We find our opinion in *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719 (*Fielder*) to be dispositive and, in light of *Fielder*, we affirm.

In support of her opposition to summary judgment, appellant presented her own declaration, as well as declarations from her daughter, Gayane Vardumyan, and an expert, Philip L. Rosescu. According to appellant and Vardumyan, on January 19, 2015, they went with Vardumyan's husband to measure and take photographs of the offset sidewalk. The photographs, which were attached as exhibits, showed that the sidewalk offset was "at least" one inch where appellant fell.

Rosescu stated in his declaration that, based on the photographs, "the height differential between adjacent concrete sidewalk slabs varied up to a maximum of approximately 1 inch in the area where [appellant] tripped and fell at the time of the incident."[2] He opined that Edsall's use of a pen to measure the offset was inaccurate and that the measurements taken by Torres were taken at only one point on the offset and therefore did not document "the maximum height of the differential." He stated that any height differential greater than 0.5 to 0.6 inches "has the substantial possibility of causing a pedestrian to trip and fall."

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[2] The trial court found Rosescu qualified to offer an expert opinion and therefore overruled respondent's objections to portions of his declaration.

Rosescu further opined that "the subject height differential would have been difficult to perceive at the time of the incident" because it was "high enough to cause a trip but low enough" not to be conspicuous or obvious. Because the height differential would not have been apparent to pedestrians, he believed it presented "a substantial trip hazard." He further believed the City's inspectors should have seen the offset and repaired it before appellant's accident. He stated that it was "inconceivable" that the inspectors could have missed the offset if they had performed proper inspections in August and September 2014 during the improvement project.

Thus, construing the evidence in the light most favorable to appellant, her evidence shows that the sidewalk offset was, at most, one inch in height. The facts of *Fielder, supra*, 71 Cal.App.3d 719 are very similar to those presented here. There, the plaintiff tripped over a depression in a sidewalk that was approximately three-fourths of an inch. A jury found the defect was a dangerous condition and found in the plaintiff's favor on her claim brought under sections 835, 830, and 830.2. This court reversed, holding that the defect was trivial as a matter of law. (*Id.* at p. 734.) We reasoned that "when two slabs of a sidewalk are nonaligned horizontally, by a slight depression, such a defect may be found to be trivial as a matter of law provided that there are no aggravating circumstances attending the defect." (*Id.* at p. 729.) The only evidence of the condition's dangerousness was the evidence of "the depth of the depression. No evidence was presented as to any other surrounding circumstances or to the fact that any other persons had been injured on the same spot." (*Id.* at pp. 733-734.)

Beck v. City of Palo Alto (1957) 150 Cal.App.2d 39 (*Beck*) also presents similar facts. There, the plaintiff tripped over a raised portion of a sidewalk that "was caused by one slab of concrete sidewalk being pushed higher than the next contiguous slab apparently by the root or roots of a pepper tree." (*Id.* at p. 43.) The plaintiff's husband testified that the elevation measured "one and five-eighths inches in the center of the sidewalk, and one and seven-eighths inches at the property side. The city engineer testified he measured the difference in elevations and found them to be one and one-eighth inches on the property side tapering to one-fourth of an inch at the street side." (*Ibid.*) The evidence showed the city had notice of the condition. The trial court, sitting without a jury, found for the plaintiff, but the appellate court reversed.

Beck reasoned that "'"[i]t is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby.'" (*Beck*, *supra*, 150 Cal.App.2d at p. 43.) In concluding that the defect was trivial as a matter of law, the court noted that defects in sidewalks had been found trivial as a matter of law where the differences in elevations were one and one-half inches, one inch, seven-eighths of an inch, and three-fourths of an inch. (*Ibid.*, citing cases.) In addition, "[t]here was nothing to hide the defect or obstruct the view of one approaching it. The [plaintiff] tripped over it

in broad daylight. She testified nothing distracted her attention as she approached the point where she tripped and fell." (*Id.* at pp. 43-44.)

The photographs of the offset submitted by appellant show that, similar to *Fielder*, the defect here was that the two slabs of sidewalk were "nonaligned horizontally" by one inch. (*Fielder*, *supra*, 71 Cal.App.3d at p. 729.) "Several decisions have found height differentials of up to one and one-half inches trivial as a matter of law. [Citations.]" (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 568; see also, e.g., *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 396-398 [three-fourths inch difference between sidewalk slabs trivial as a matter of law]; *Ness v. City of San Diego* (1956) 144 Cal.App.2d 668, 673 [seven-eighths inch difference between sidewalk slabs trivial as a matter of law]; *Nicholson v. City of Los Angeles* (1936) 5 Cal.2d 361, 363 [one and one-half inch difference insufficient to impart constructive notice to city]; *Whiting v. City of National City* (1937) 9 Cal.2d 163, 165-166 [three-fourths inch difference in sidewalk elevation insufficient to impart constructive notice].) Thus, a "preliminary analysis" of the "type and size of the defect" reveals that the offset was trivial. (*Stathoulis*, *supra*, 164 Cal.App.4th at p. 567.) Moreover, there is no "evidence of any additional factors such as the weather, lighting and visibility conditions at the time of the accident, the existence of debris or obstructions, and plaintiff's knowledge of the area . . . [to] indicate the defect was sufficiently dangerous to a reasonably careful person." (*Id.* at pp. 567-568.)

Similar to *Fielder*, the only evidence appellant presented regarding the dangerousness of the sidewalk was the height of the offset. She presented no evidence of aggravating circumstances or of other injuries due to the offset. (See *Fielder*, *supra*, 71 Cal.App.3d at pp. 733-734; see also *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927 (*Caloroso*) [where the difference in elevation created by the crack in a private landowner's sidewalk was less than half an inch, this court held that the defect "should . . . be deemed trivial as a matter of law, unless there is disputed evidence that other conditions made the walkway dangerous"].) As in *Beck*, appellant tripped in broad daylight, and there was nothing hiding the offset or obstructing her view of it. (See *Beck*, *supra*, 150 Cal.App.2d at pp. 43-44.)[3] Nor was there any evidence that the weather affected her view of the sidewalk or that the offset has caused other accidents. (See *Stathoulis*, *supra*, 164 Cal.App.4th at pp. 566–567.)

Appellant argues that she has raised a triable issue of material fact, pointing to Edsall's statements in his deposition that the offset was greater than one-half inch and that respondent would have repaired the

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[3] Appellant contends that *Fielder* and *Beck* are inapposite because they involved trials on the merits rather than summary judgment motions. However, in both cases the appellate court reversed the findings, concluding that the defects were trivial as a matter of law. (See *Fielder*, *supra*, 71 Cal.App.3d at p. 734 ["when the only evidence available on the issue of dangerousness does not lead to the conclusion that reasonable minds may differ, then it is proper for the court to find that the defect was trivial as a matter of law"]; *Beck*, *supra*, 150 Cal.App.2d at p. 42 ["The question of whether the defect was trivial or not is reviewed by the appellate court without regard to the finding of the trial court. It is a redetermination of the issue from the record [citations]"].)

offset if it was one inch. Appellant also cites Torres' deposition testimony that he would have ordered the repair of a one-half inch offset as a trip hazard. The evidence that the City would have repaired an offset of one-half inch or one inch is not "evidence of any aggravating circumstances or factors which might have increased the dangerousness of the defect." (*Fielder*, *supra*, 71 Cal.App.3d at p. 726.)

Nor does Rosescu's opinion that the offset "should have been obvious" to the City's employees and that the offset was one inch at the time of appellant's fall raise a genuine issue of fact whether the offset was trivial as a matter of law. As discussed above, the size and type of defect and the lack of any evidence of aggravating circumstances require us to conclude that the defect was trivial as a matter of law.

Appellant's reliance on *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806 (*Laurenzi*) is unavailing. There, the evidence showed that "the hole in the sidewalk was 2 to 2 1/2 inches deep, 3 or 4 to 5 or 6 inches wide at the north end, 2 inches wide at the south end, and about 12 inches long, and that it had existed for four or five years." (*Id.* at p. 811.) The evidence also showed that it was dark when the accident occurred, there was only one light on the sidewalk, the sidewalk was wet, and there were vegetables scattered on the sidewalk. (*Id.* at p. 808.) The issue accordingly was whether the plaintiff had presented evidence sufficient to withstand a motion for nonsuit as to whether the city and county of San Francisco had notice of the defect. There was no evidence of actual notice, but the court cited testimony that, if the inspector for the municipality "had seen a condition of the sidewalk such as that testified to and pictured in the photographs, he would have considered it

hazardous and as requiring a correction of the defect or condition." (*Id.* at p. 812.) In light of that evidence, the court concluded that the city was presumed to have notice of the defect and therefore the issue of the city's liability was a matter for the jury. (*Ibid.*)

In *Laurenzi* the evidence showed that the defect in the sidewalk was large, and there were numerous aggravating circumstances making the situation dangerous, including the lack of light, the wet sidewalk, and the debris scattered on the sidewalk. By contrast, the defect here was much smaller and there was no evidence of any aggravating circumstances. The defect thus is trivial as a matter of law, "irrespective of the question whether [respondent] had notice of the condition. [Citations.]" (*Caloroso*, *supra*, 122 Cal.App.4th at p. 929.)

As we stated in *Fielder*, "it is impossible for a city to maintain its sidewalks in perfect condition. Minor defects nearly always have to exist. The city is not an insurer of the public ways against all defects. If a defect will generally cause no harm when one uses the sidewalk with ordinary care, then the city is not to be held liable if, in fact, injury does arise from the defect." (*Fielder*, *supra*, 71 Cal.App.3d at pp. 725–726.)

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.